Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1913
In the Supreme Court of the United States
October Term, 1995

THIOKOL CORPORATION, et al.,

Petitioners,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

June 28, 1996

63 pp

QUESTIONS PRESENTED

The Michigan Single Business Tax ("SBT"), Mich. Comp. Laws § 208.1 *et seq.* is a value-added tax using an addition method of calculating value added. It requires taxpayers doing business in Michigan to include in their tax base "compensation", including payments to employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Another Michigan statute, Mich. Comp. Laws § 205.27a(6), imposes a statute of limitations and requires taxpayers seeking refunds on the ground that the tax violates the federal constitution to file such claims within 90 days after the date set for filing a return.

Specifically the issues presented in this case are:

I. Whether ERISA § 514(a) pre-empts the Michigan SBT.

II. Whether ERISA § 514(a) pre-empts the statute of limitation in Mich. Comp. Laws § 205.27a(6).

III. Whether the federal courts have jurisdiction to consider a declaratory judgment seeking declaration that the statute of limitations in Mich. Comp. Laws §205.27a(6) violates the Due Process and Equal Protection Clauses of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

COUNTERSTATEMENT OF THE CASE 2

A. Parties and Nature of the Issue 2
B. Jurisdiction 3
C. The Single Business Tax Act 4

REASONS FOR DENYING THE WRIT 6

A. The Court of Appeals correctly decided that Michigan's value-added SBT is not pre-empted because it affects ERISA plans in too tenuous, remote, or peripheral a manner 6

1. The Court of Appeals properly recognized the principles of ERISA pre-emption announced by this Court 6

2. The Court of Appeals properly applied this Court's principles of ERISA pre-emption when concluding that Michigan's value-added SBT is not pre-empted 10

B. The Court of Appeals properly rejected Petitioners' challenges to Michigan's Statute of Limitations 15

1. ERISA does not pre-empt the Michigan Statute of Limitations governing tax refunds 15

2. Federal Courts lack jurisdiction to address the constitutionality of Michigan's Statute of Limitations 15

C. Petitioner's arguments improperly elevate form over substance and were appropriately rejected by the Court of Appeals 16

1. There is no basis for the claim that the SBT affects employee plans 16

2. The SBT is not a tax on employer contributions 18

3. Cases relied on by Petitioners are distinguishable and irrelevant 19

D. There are no compelling reasons to grant Certiorari 21

1. There is no conflict with decisions of this Court 21

2. Petitioners grossly overstate the policy concerns inherent in this case 22

RELIEF SOUGHT 24

TABLE OF AUTHORITIES

Pages

Cases

Akzo America, Inc. v. Revenue Division, Case No. 4:93-CV-101, 1995 U.S. Dist. LEXIS 1784, 1995 WL 44043 (W.D. Mich. Jan. 13, 1995)..... 12,14

The District of Columbia and Sharon Pratt Kelley, Mayor v. Greater Washington Board of Trade, 506 U.S. 125; 113 S. Ct. 580; 121 L. Ed. 2d 513 (1992).....7,8,11,12,13

Firestone Tire & Rubber Co. v. Neuser, 810 F.2d 550 (6th Cir. 1987)..... 13,14

Green v. Mansour, 474 U.S. 64; 106 S. Ct. 423; 88 L. Ed. 2d 371 (1985).....16

McLeod v. J. E. Dilworth Co., 322 U.S. 327; 64 S. Ct. 1023; 88 L. Ed. 1304 (1944).....20

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., __ U.S. __; 115 S. Ct. 1671; 131 L. Ed. 2d 695 (1995).....passim

Oklahoma Tax Comm. v. Jefferson Lines, Inc., __ U.S. __; 115 S. Ct. 1331; 131 L. Ed. 2d 261 (1995).....20

Shaw v. Delta Airlines, Inc., 463 U.S. 85; 103 S. Ct. 2890; 77 L. Ed. 2d 490 (1983).....passim

Thiokol Corp. v. Roberts, 76 F.3d 751 (6th Cir. 1996).....1,4,5,13

Thiokol Corp. v. Roberts, 858 F. Supp. 674 (W.D. Mich. 1994).....passim

Thiokol Corp. v. Roberts, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864 (W. D. Mich. Jan. 28, 1994)..... 1,15,16

Thiokol Corp. v. Dep't. of Treasury, 987 F.2d 376 (6th Cir. 1993)..... 1,3,15

Travelers Insurance v. Cuomo,
14 F.3d 708 (2nd Cir. 1993)..... 23

Trinova Corp. v. Michigan Dep't. of Treasury,
498 U.S. 358; 111 S. Ct. 818;
112 L. Ed. 2d 884 (1991)..... passim

United Wire v. Morristown Memorial Hospital,
995 F.2d 1179 (3rd Cir. 1993)..... 23

Statutes

29 U.S.C. § 1002(21)(A)..... 2
29 U.S.C. § 1132..... 4
29 U.S.C. §§ 1132(e)(1) and 1132(a)(3)..... 3,4
29 U.S.C. § 1144(a)..... 3,6
28 U.S.C. § 1331..... 3,4
28 U.S.C. § 1341..... 1,4
28 U.S.C. § 2201..... 3,4
Rev. Stat. § 3701, 31 U.S.C. § 742..... 19,20

Mich. Comp. Laws § 205.1 *et seq*..... 4
Mich. Comp. Laws § 205.27a(6)..... 4,15
Mich. Comp. Laws § 208.1 *et seq*..... 2
Mich. Comp. Laws § 208.3(3)..... 5
Mich. Comp. Laws § 208.4(3)..... 3,18
Mich. Comp. Laws § 208.9..... 5
Mich. Comp. Laws § 208.9(5)..... 5
Mich. Comp. Laws § 208.31..... 19
Mich. Comp. Laws § 208.31(3)..... 4

Other Source

Jenkins, State Taxation of Interstate
Commerce, 27 Tenn. L. Rev. 239 (1960)..... 19

OPINIONS BELOW

In addition to the opinions cited by Petitioners and attached in their appendix, Respondents alert the Court to the March 5, 1993 decision of the Sixth Circuit Court of Appeals in *Thiokol Corp. v. Dep't. of Treasury*,[1] 987 F.2d 376 (6th Cir. 1993), which addressed jurisdictional issues involving the Tax Injunction Act, 28 U.S.C. § 1341, and the Eleventh Amendment of the United States Constitution. (Respondents' App. 9b). In their decision the Court of Appeals affirmed the District Court's dismissal of all claims for monetary damages against all of the Defendants as well as all claims against the Department of Treasury. The Court of Appeals reversed the District Court's dismissal of claims for injunctive and declaratory relief under ERISA as against the Respondent-officials acting in their official capacities and remanded for determination of those issues. Subsequently, the District Court denied Petitioner Thiokol Corporation's request to amend its complaint to seek declaratory relief with respect to the statute of limitations applicable to tax refunds. *Thiokol Corp. v. Roberts*, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864 (W. D. Mich. Jan. 28, 1994).[2] (Respondents' App. 1b).

---

[1] The complaints filed in this matter named as Defendants the Department of Treasury, State of Michigan, Revenue Division; the State Treasurer in his official capacity; and the Commissioner of Revenue in his official capacity.

[2] This unpublished opinion of the District Court is referenced at footnote 6 in the Court of Appeals opinion on the merits in *Thiokol Corp. v. Roberts*, 76 F.3d 751 (6th Cir. 1996). (Petitioners' App. 26).

COUNTERSTATEMENT OF THE CASE

A. Parties and Nature of the Issue

Petitioners are corporate entities that by virtue of engaging in business activity in the State of Michigan are Michigan Single Business Tax taxpayers. Petitioners also act as sponsors and administrators of qualified employee benefit plans governed by ERISA. When engaged in certain activities specified at Section 3(21), 29 U.S.C. §1002(21)(A), of ERISA, Petitioners are fiduciaries with respect to the benefit plans that they sponsor and administer. Respondents are the Treasurer of the State of Michigan and the Commissioner of Revenue of the State of Michigan, both of whom are statutorily obligated to administer and implement the State's taxing laws, including the Single Business Tax Act, ("SBTA" or "SBT"), Mich. Comp. Laws § 208.1 *et seq.*

Petitioners challenge the inclusion in the SBT tax base of "compensation" to the extent it encompasses contributions to employee benefit plans covered by ERISA. The statutory definition of "compensation", with its detailed list of examples of taxpayer payments included within that definition, reads as follows:

> "Compensation" means all wages, salaries, fees, bonuses, commissions or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers and subject to or specifically exempt from withholding under section 3401 of the internal revenue code. Compensation includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for workmen's compensation insurance, payments to individuals not currently

> working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for the administration of health and welfare and noninsured benefit plans.

Mich. Comp. Laws § 208.4(3)[3] (emphasis added). (Petitioners' App. 76-77).

The language which Petitioners contend preempts the SBT is set forth at Section 514(a), 29 U.S.C. § 1144(a), of ERISA. That provision reads as follows:

> **(a) Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C.S. § 1003(a)] and not exempt under section 4(b) [29 U.S.C.S. § 1003(b)]. This section shall take effect on January 1, 1975.

(Petitioners' App. 2).

B. Jurisdiction

Petitioners assert federal court jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201, and also under 29 U.S.C. §1132(e)(1). (Petition p. 2). Respondents contend that jurisdiction is established by, and limited as set forth in, the Sixth Circuit Court of Appeals decision in *Thiokol Corp. v. Dep't. of Treasury*, 987 F.2d 376 (6th Cir. 1993).

---

[3] 1995 Mich. Pub. Acts, No. 285 effective January 9, 1996, amended this definition to exclude specified unemployment, federal insurance contribution act, and worker's compensation payments.

(Respondents' App. 9b). Jurisdiction is premised solely upon 29 U.S.C. §§ 1132(e)(1) and 1132(a)(3). The general jurisdictional provision, 28 U.S.C. § 1331, is inapplicable because suits against states and their officers named in their official capacity are precluded by the Eleventh Amendment. The Declaratory Judgment Act, 28 U.S.C. § 2201, is inapplicable because 29 U.S.C. § 1132 of ERISA provides for all appropriate declaratory and injunctive relief.

The federal courts lack jurisdiction over Petitioners' challenge to the statute of limitations set forth at Mich. Comp. Laws § 205.27a(6), of the Michigan revenue act, Mich. Comp. Laws § 205.1 *et seq.*, for the reason that the action is barred by the Tax Injunction Act, ("TIA"), 28 U.S.C. § 1341, the Eleventh Amendment of the United States Constitution, and application of the comity doctrine.

C. The Single Business Tax Act

The Michigan SBT is a value-added tax imposed on the privilege of engaging in business in Michigan. Mich. Comp. Laws § 208.31(3). Value added by definition represents the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale. *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358, 362; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991). A value-added tax is a tax on a bona fide non-divisible tax base which is a measure of business activity. *Id.* at 374-375.

Value added can be determined by two equivalent means, i.e., the "subtractive" or the "additive" method. The additive method expresses value added as: the sum of the cost of labor plus depreciation plus interest plus profit. The subtractive method expresses value added as: revenues less cost of materials. Each method provides an identical measurement of value added. *Id.* at 364-365. The SBT tax base, as statutorily prescribed, is calculated by the additive method. *Id.* at 367; *Thiokol Corp. v. Roberts*, 858 F. Supp. 674, 677 (W.D. Mich. 1994) (Petitioners' App. 40), and *Thiokol Corp. v. Roberts*, 76 F.3d 751, 755-756 (6th Cir. 1996) (Petitioners' App. 10). Michigan uses the additive method of calculating the tax base as a convenience to taxpayers for

whom federal taxable income provides a familiar starting point. *Trinova*, 498 U.S. at 377, and *Thiokol Corp.*, 76 F.3d at 755. (Petitioners' App. 11). For corporate taxpayers the calculation starts with business income (defined at Mich. Comp. Laws § 208.3(3) to mean federal taxable income) which is subjected to prescribed additions and subtractions. Mich. Comp. Laws § 208.9. The specific provision at issue ("add back provision") requires the addition of "compensation", as defined in Section 4 of the SBTA, to business income in the SBT tax base calculation. Mich. Comp. Laws § 208.9(5).

In *Trinova*, this Court considered the constitutionality under both the Due Process and Commerce Clauses of the three-factor apportionment formula utilized by the SBTA. 498 U.S. at 361. The *Trinova* Court discussed in great detail the theoretical underpinnings as well as the operational mechanisms of value-added taxation and the Michigan SBT. This Court rejected Trinova's argument that the Michigan SBT can and should be analyzed as three separate and distinct taxes on the major components of the tax base, i.e., compensation, depreciation and income. 498 U.S. at 374-375.

The *Trinova* decision is important in the instant case because it: (1) underscores the value-added nature of the tax; (2) acknowledges the indivisibility of the tax base; and (3) establishes the equivalence of the addition and subtraction methods of arriving at the tax base. This Court explicitly rejected the contentions of Trinova which were premised upon the additive method of the tax calculation:

> Trinova's attempted characterization is arguable only because Michigan calculates value added by the addition method. The addition and subtraction methods of calculating value, however, are but two different paths to the same result. See n 2, supra. Had Michigan calculated the SBT tax base by the subtraction method, reporting total revenues minus total cost of materials, Trinova's characterization would collapse of its own weight.

Id. at 376.

In the present case, Petitioners' claim for pre-emption is predicated wholly on the required add-back of the contributions to and fees associated with certain employee benefit plans. The gravamen of Petitioners' case is the definitional language defining "compensation" and establishing the tax base. This language arises as a result of Michigan's determination to utilize the additive, rather than the subtractive, method of calculating the base.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals correctly decided that Michigan's value-added SBT is not pre-empted because it affects ERISA plans in too tenuous, remote, or peripheral a manner.

1. The Court of Appeals properly recognized the principles of ERISA pre-emption announced by this Court.

Section 514(a) of ERISA sets forth the statutory standard applicable in ERISA preemption cases. That section provides that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

The operative words "relate to" were defined in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85; 103 S. Ct. 2890; 77 L. Ed. 2d 490 (1983), where the Court held that a state Human Rights Law which prohibited employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy and a Disability Benefits Law which required employers to pay employees specific benefits "relate[d] to" ERISA benefit plans. 463 U.S. at 97.

In *Shaw*, the Court set forth what has become the standard in pre-emption cases.

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a

connection with or reference to such a plan.[16]

Id. at 96-97.[4]

In reaching its conclusion, the *Shaw* Court stated that § 514(a) should not be read to "preempt only state laws specifically designed to affect employee benefit plans", nor should it be interpreted to preempt only state laws dealing with the subject matters covered by ERISA. *Id.* at 98. Additionally, the Court alluded to the legislative history discussing the scope of the preemption provision which reflects congressional concern with conflicting and inconsistent state and local regulation which could impact negatively on employee benefit plans. *Id.* at 99.

Importantly, the Court in *Shaw* at footnote 21, which immediately follows its holding on the "relates to" issue, indicated that some state actions may affect an employee benefit plan in "too tenuous, remote or peripheral" a way to warrant a finding that the state action "relates to" the plan:

> Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. Cf. *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (CA 2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted). The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

463 U.S. at 101, n 21. (emphasis added).

The standard enunciated in *Shaw* is reiterated in all of this Court's ERISA preemption cases that have been decided since. See, *The District of Columbia and Sharon Pratt Kelley,*

[4] Footnote 16 in the above quotation sets forth Black's Law Dictionary's definition of "relate" as: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."

Mayor v. Greater Washington Board of Trade, 506 U.S. 125; 113 S. Ct. 580; 121 L. Ed. 2d 513 (1992), where this Court sets forth the standard established in *Shaw* and then cites to all of the Supreme Court cases subsequent to *Shaw* which utilize the standard. 506 U.S. at 129. The *Greater Washington Board* Court in its statement of the applicable standard paraphrases the *Shaw* exception to preemption at its footnote 1:

> Pre-emption does not occur, however, if the state law has only a "tenuous, remote, or peripheral" connection with covered plans, Shaw, 463 US, at 100, n 21, 77 L Ed 2d 490, 103 S Ct 2890, as is the case with many laws of general applicability, see Mackey, 486 US, at 830-838, and n 12, 100 L Ed 2d 836, 108 S Ct 2182; cf. Ingersoll-Rand, 498 US at 139, 112 L Ed 2d 474, 111 S Ct 478.

506 U.S. at 129.

This Court's most recent pronouncement on ERISA pre-emption reiterated the *Shaw* standard and referred to the exception to preemption as expressed in *Greater Washington Board*. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, __ U.S. __; 115 S. Ct. 1671; 131 L. Ed. 2d 695, 708-709 (1995). In *Travelers*, this Court upheld a statutory scheme which exacted surcharges from patients whose commercial insurance coverage was purchased by employee benefit-care plans governed by ERISA as well as patients whose health maintenance organization's fees were paid by an ERISA plan. In reaching its conclusion, this Court acknowledged that the phrase "relates to" constitutes words of limitation in spite of the extreme breadth that those words potentially convey. The Court explained:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere", H. James, Roderick Hudson xli (New York ed, World's Classics 1980). But that, of course, would be to read

> Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase "relate to" does not give us much help drawing the line here.

131 L. Ed. 2d at 705. (emphasis added).

The Court then set forth the *Shaw* definition of "relate to" as encompassing a "connection with or reference to" and states that the surcharge statute does not make "reference" to ERISA plans. In construing the "connection with" language of the standard the Court stated:

> [A]n uncritical literalism is no more help than in trying to construe "relate to." For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

131 L. Ed. 2d at 705. (emphasis added).

Travelers emphasized the need to look to the objectives of the ERISA statute as a guide to the scope of the state laws that Congress understood would survive preemption. *Id.* at 705. In this regard the *Travelers* Court mentioned the need to minimize the administrative and financial burden of complying with conflicting state regulations in order to permit the nationally uniform administration of employee benefit plans. *Id.* at 706. The Court discussed its prior cases dealing with ERISA pre-emption to underscore the congressional intent to preclude state laws from mandating employee benefit structures, their administration, or alternative enforcement mechanisms. 131 L. Ed. 2d at 706-707.

The *Travelers* Court went on to note that while the New York surcharge statute created an indirect economic effect on choices made by ERISA plans, this was not in itself sufficient to mandate pre-emption.

> If a law authorizing an indirect source of administrative cost [like the garnishment statute in Mackey] is not preempted, it should follow that a law [like New York's surcharge statutes] operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either.

Id. at 709.

> 2. The Court of Appeals properly applied this Court's principles of ERISA pre-emption when concluding that Michigan's value-added SBT is not pre-empted.

The District Court, in *Thiokol Corp.*, 858 F. Supp. at 676, understood its task to be that of "determin[ing] the precise relationship between a state law and an ERISA plan, specifically answering the question of whether the state law [at issue] affects an ERISA plan in too tenuous, remote or peripheral a manner to 'relate to' the plan." (Citation omitted). (Petitioners' App. 46).

Realizing that Michigan's SBT is a value-added tax, commonly utilized in Europe and Latin America but not the United States, the District Court in *Thiokol Corp., supra,* appropriately discussed at length the nature of value-added taxation. In doing so, the District Court referred to this Court's discussion of value-added precepts in *Trinova v. Michigan Dep't. of Treasury, supra.*

The opinion set forth several findings regarding value-added taxation in general and the SBT in particular. Specifically, the District Court, in *Thiokol Corp., supra,* concluded that value added is a measure of the entire economic activity of a business which is defined as the increase in the value of goods and services brought about by

whatever a business does to them between time of purchase and time of sale. 858 F. Supp. at 676. (Petitioners' App. 46, 50). The District Court, in *Thiokol Corp., supra,* also stated that value added can be expressed by three different methods -- subtraction, addition, or credit, and that the method of calculation does not change the fundamental nature or the amount of tax. 858 F. Supp. at 677-678. (Petitioners' App. 50). Further, the District Court specifically found that the SBT is not a tax on the individual components of the tax base and is not a tax on an employer's ERISA plan contributions. 858 F. Supp. at 678-679. (Petitioners' App. 52).

Following its discussion of the nature of the tax, the District Court, in *Thiokol Corp., supra,* undertook a thorough analysis of preemption jurisprudence and concluded that any effect or impact that the SBT may have on ERISA plans is incidental and that the effect is tenuous, remote and peripheral. 858 F. Supp. at 680. (Petitioners' App. 57-59). The District Court then discussed and rejected Petitioners' suggestion that this Court's decision in *Greater Washington Board, supra,* mandates a finding of preemption in all instances where a state statute makes a reference to an ERISA plan. 858 F. Supp. at 680-683. (Petitioners' App. 59-65). In conclusion the District Court stated:

> After a thorough review, I conclude that the Michigan SBT is not preempted by ERISA. This conclusion is based on the following facts.
>
> (1) The SBT is a neutral tax of general application which does not single out ERISA plans for special treatment nor predicate rights or obligations on the existence of such plans.
>
> (2) The SBT does not regulate ERISA plans.
>
> (3) The SBT does not affect ERISA plans or the relationships between, or among, ERISA entities.

> (4) The SBT is neither a direct nor indirect tax on employer contributions to ERISA plans. The SBT is a value added tax, akin to a sales tax, which merely does not allow a deduction for ERISA contributions made by an employer.
>
> (5) Any minimal effect the SBT may have on employer contributions to ERISA plans is incidental and unavoidable; such an effect could be found in nearly every state law which regulates business. This incidental effect is tenuous, remote and peripheral.
>
> (6) I have found no case that has held a state law "relates to" and is preempted by ERISA merely because it refers to ERISA. Likewise, I decline to so hold.

858 F. Supp. at 683-684. (Petitioners' App. 66-67).

In *Akzo America, Inc. v. Revenue Division,* Case No. 4:93-CV-101, 1995 U.S. Dist. LEXIS 1784, 1995 WL 44043 (W.D. Mich. Jan. 13, 1995), the District Court agreed with all of the conclusions of the *Thiokol* court save one. (Petitioners' App. 32-33). The District Court, in *Akzo America, supra,* believed that the decision in *Greater Washington Board* mandated pre-emption in all cases where a state statute makes a reference to an ERISA plan. (Petitioners' App. 36-37). The District Court, in *Akzo America, supra,* reached this conclusion in spite of its finding that the SBT had no more than a tenuous, remote or peripheral effect on an ERISA plan. (Petitioners' App. 36). The District Court stated:

> Since the "tenuous, remote, or peripheral" exception does not apply to a state law which refers to an ERISA plan, it is of no effect, in this Court's estimation, that the SBT has merely a tenuous, remote, or peripheral effect on ERISA plans.

(emphasis added). 1995 U.S. Dist. LEXIS 1784 *at 7. (Petitioners' App. 36).

The Court of Appeals concurred with the detailed analysis of Michigan's SBT in *Thiokol Corp., supra,* 76 F.3d at 755-756. (Petitioners' App. 10-13). The appellate court noted specifically that the SBT is a tax on value added, and acknowledged that Michigan chose the addition method of calculating value added as an accommodation to taxpayers because it entailed easier calculations using as the starting point federal taxable income which is familiar to all corporate taxpayers. The Court of Appeals also concluded that a value-added tax is not a tax on the individual components that go into the calculation of value added. 76 F.3d at 755-756. (Petitioners' App. 11-12).

The Court of Appeals began its consideration of whether the SBT is preempted by acknowledging this Court's previous decisions indicating the conspicuous breadth of the ERISA preemption language used by Congress. Citing specifically to this Court's decision in *Shaw, supra,* the Court of Appeals noted that the *Shaw* decision carved out an exception to the ERISA pre-emption provision for those state laws that "affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." The Court of Appeals determined that the *Shaw* exception has continuing viability as evidenced in this Court's decisions in *Greater Washington Board,* and *Travelers. Thiokol Corp.,* 76 F.3d at 754. (Petitioners' App. 6-7).

In reaching its conclusion to uphold the Michigan statutory provision the Court applied the three-part test enumerated by the Sixth Circuit in *Firestone Tire & Rubber Co.*

v. Neuser, 810 F.2d 550 (6th Cir. 1987).[5] Application of the test resulted in a finding that the SBT provision is within the *Shaw* exception as a statute that has "at most, a tenuous, remote, or peripheral effect on an ERISA plan." 76 F.3d at 754-755. (Petitioners' App. 8). In its discussion of the *Shaw* test and the application of ERISA pre-emption, the Sixth Circuit emphasized that the preclusion of state laws creating a burdensome effect on ERISA plans is at the heart of the pre-emption doctrine.

> Congress sought to pre-empt State laws that have a burdensome effect on ERISA plans. When a state law has such an effect on a covered plan, it is pre-empted; when it does not, it is not pre-empted even if it actually refers to ERISA.

76 F.3d at 757. (emphasis in the original).

The Sixth Circuit went on to consider and reject Petitioners' contention, accepted by the District Court, in *Akzo America*, that there is a per se rule of pre-emption in all cases where a state statute makes a reference to ERISA. In reaching its holding, the Court of Appeals concluded that "connection with" and "refers to" cases are not "analytically distinct" but rather are "approximations of the same test"

---

[5] Petitioners at page 14 of their Petition mischaracterize the method of analysis utilized by the Sixth Circuit in *Firestone* and in *Thiokol*. The three-prong analysis in *Firestone* is not an analysis that is separate and distinct from the test enunciated in *Shaw* as suggested by Petitioners. Rather, the *Firestone* three-prong analysis is a methodology used to assist the Court in determining whether the effect of a state law is tenuous, remote or peripheral under the *Shaw* standard. *Firestone, supra* at 555:

> Although no single test has been formulated for determining when a state law falls within the "remote and peripheral" exception to section 1144, several factors have been used in the analysis.

which looks to evaluate and determine if the statutes at issue have an "impermissible effect on a covered plan." 76 F.3d at 758. (Petitioners' App. 19).

B. The Court of Appeals properly rejected Petitioners' challenges to Michigan's Statute of Limitations.

1. ERISA does not pre-empt the Michigan Statute of Limitations governing tax refunds.

Petitioners assert that ERISA pre-empts Michigan's statute of limitations for tax refunds. The Court of Appeals succinctly and correctly addressed this issue. The statute of limitations has no cognizable effect on employee benefit plans. At most the limitations provision has only a peripheral effect on ERISA-based challenges to Michigan's tax laws. The Court of Appeals correctly held that the statute of limitations provision is not pre-empted by ERISA. 76 F.3d at 761. (Petitioners' App. 25-27).

2. Federal Courts lack jurisdiction to address the constitutionality of Michigan's Statute of Limitations.

Petitioners try to portray their claim raising constitutional challenges to Michigan's statute of limitations provision,[6] governing claims for tax refunds as "closely aligned" to their claim that a portion of the SBT tax base is pre-empted by ERISA. (Petition p. 29). The District Court, in *Thiokol Corp. v. Roberts*, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864 (W. D. Mich. Jan. 28, 1994) (Respondents' App. 1b), correctly perceived that Petitioners' attack on the statute of limitations is not aligned with the ERISA action but is intertwined with their refund claims which are only appropriately addressed in the state courts. *Thiokol Corp., supra.* (Respondents' App. 6b-7b). As such the Tax Injunction Act and its underlying doctrine rooted in comity militate against the federal courts addressing these issues. This is precisely what the Sixth Circuit held in *Thiokol Corp. v. Dep't. of Treasury*, 987 F.2d 376 (6th Cir. 1993). (Respondents' App. 9b).

[6] Mich. Comp. Laws § 205.27a(6).

Additionally, Petitioners sought a federal court ruling in order to present it as res judicata on state refund claims brought in state courts.[7] As pointed out in *Thiokol Corp. v. Roberts*, Case No. 4:90-CV-12, 1994 U.S. Dist. LEXIS 1864, at *9 (W. D. Mich. Jan. 28, 1994) (Respondents' App. 7b), this is precluded by the rule of law announced in *Green v. Mansour*, 474 U.S. 64, 73; 106 S. Ct. 423; 88 L. Ed. 2d 371 (1985).

C. Petitioners' arguments improperly elevate form over substance and were appropriately rejected by the Court of Appeals.

1. There is no basis for the claim that the SBT affects employee plans.

The Third Amended Complaint filed by Thiokol Corporation in *Thiokol Corp. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994) (Petitioners' App. 40), sets forth nine paragraphs of allegations purporting to detail how the SBT "relates to" ERISA benefit plans, burdens the "sponsoring employer as plan sponsor, administrator and fiduciary", and "influences and affects" Thiokol Corporation and the plans. In response to Respondents' interrogatories seeking to flesh out the factual basis supporting these claims, Thiokol Corporation presented a short statement which reads as follows:

> Response.
>
> * * *
>
> The ability of Petitioners to fund its [sic] employee benefit plans is impacted not only

[7] Petition p. 30:

> **"a determination of the constitutionality of § 27a(6) made by this Court in the context of Petitioners' related ERISA claims would have universal application, and would resolve the issue with precision, authority and finality."**
> (emphasis in original).

> by the direct cost of making the required contributions or paying the expenses incurred, but also by every other expense of doing business, which expenses exert a pressure against the ability to fund employee benefit plans. As the costs of doing business increase, a prudent manager will look for ways to hold total costs down. Some costs can be controlled - others cannot.
>
> Since the Michigan single business tax (SBT) is higher than it otherwise would be if the cost of employee benefits was not included in the tax base, it naturally follows that the SBT is one of the non-controllable costs that brings pressure on management to reduce the amount of employee benefits, a controllable cost. If management determines that benefit levels are not to be decreased, then in the face of other rising costs (including SBT) the cost of maintaining the same level of benefits is higher.
>
> Because the SBT base includes the cost of employee benefits, management can see a direct correlation between that particular tax and the cost of funding employee benefits. This cost relationship effect [sic] Petitioners in their capacities as business entities, employers, plan sponsors, plan administrators and fiduciaries.

(emphasis added).

As the foregoing response reveals, Petitioners assert nothing more than the obvious--the SBT is a tax and as such is another cost of doing business which results in a reduction in funds to the business-taxpayer who is responsible for paying the tax. While such a reduction in funds may influence what an employer can or is willing to pay in wages and employee benefits, it does so in precisely the same

manner as all other tax exactions and necessary expenses.[8]

2. The SBT is not a tax on employer contributions.

The SBT is not a tax on plan contributions.[9] The SBT is not a tax on compensation or profits. It is a tax on value added. Because the SBT is not a tax on compensation, it cannot be a tax on any of the separately enumerated examples of compensation listed within the statutory definition at Mich. Comp. Laws § 208.4(3). This is most clearly evidenced by the fact that there is no direct correlation between contributions to employee benefit plans and SBT liability. To the extent that sums are retained as profit or otherwise consumed in the economic endeavor of the taxpayer the tax liability may not be impacted at all by a decision to lower contributions to a qualified plan. This was recognized by this Court in *Trinova*.

> If Trinova had paid an additional $100 million in compensation during 1980, there is no way of knowing whether, or to what extent, value added would have increased. In fact, value added would not have increased so long as revenues did not increase. These

[8] Petitioners' efforts to interject the "uncontraverted testimony" of John C. Hedley into this case should be scrutinized with care. The references cited do not support the broad contentions that Petitioners attribute to them in their Petition. (Petition pp. 3, 19). Rather, the deposition testimony confirms what Respondents elicited from Petitioner-Thiokol in its interrogatories.

[9] The District Court was emphatic. "Plaintiffs assert that the SBT is a tax on contributions to ERISA plans. As such, Plaintiffs argue that the SBT relates to ERISA and should be preempted by ERISA. I am satisfied that Plaitniffs' argument fundamentally misinterprets the nature of the value added tax." 858 F. Supp. at 679.

> elements of value added are inextricable, codependent variables. *Trinova*, 498 U.S. at 376.

The decision in *Trinova* alerts to the need to determine precisely what is being subjected to tax.

> "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."

Trinova, 498 U.S. at 374, quoting Jenkins, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242 (1960).

The Michigan SBT is precisely what it purports to be: a generally applicable business tax on the privilege of engaging in business in Michigan. Mich. Comp. Laws § 208.31.

When the SBT is understood for what it is, Petitioners' contentions collapse. There is no "reversal" of federal tax deductions for plan contributions as suggested by Petitioners. (Petition p. 2). While federal taxable income is utilized as a convenient starting point to calculate the base,[10] the SBT is unrelated to the federal income tax or any type of income tax. The SBT does not seek payment "for the privilege of sponsoring employee benefit plans". (Petition p. 3). Rather, the SBT imposes a tax on the privilege of doing business measured by value added.

> 3. Cases relied on by Petitioners are distinguishable and irrelevant.

In their petition seeking certiorari in this Court, Petitioners for the first time seek to rely on case law discussing a federal statutory exemption from state or local taxation for "all stocks, bonds, treasury notes, and other obligations of the United States." Rev. Stat. § 3701, 31

[10] Michigan chose the addition method of calculating value added as a convenience to taxpayers for whom federal taxable income provided an easy starting point. *Trinova*, 498 U.S. at 377. This point was recognized by the Court of Appeals, as well. 76 F.3d at 755. (Petitioners' App. 11).

U.S.C. § 742. These cases are inapplicable to the issue of whether ERISA pre-empts state laws. There is an adequate body of case law concerning ERISA pre-emption, and Petitioners' reference to bank share cases is an unnecessary and distracting digression.

The test that is applicable to the determination of ERISA pre-emption does not look to the manner of calculation of a tax. Rather the "relates to" test as established by *Shaw* and its progeny, looks to the "effect" a state law has on ERISA-qualified plans.

Petitioners also cite *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327; 64 S. Ct. 1023; 88 L. Ed. 1304 (1944), and *Oklahoma Tax Comm. v. Jefferson Lines, Inc.*, ___ U.S. ___; 115 S. Ct. 1331; 131 L. Ed. 2d 261 (1995), to advance a claim that the District Court in *Thiokol* and the Court of Appeals ignored the substance of the SBT by their refusal to find preemption of that portion of the "compensation" add-back provision which includes contributions to qualified plans. The cases cited do not support Petitioners' contention. Rather, they support Respondents' position. While the Court in *Jefferson Lines* acknowledged the complementary goals of the sales and use taxes, the opinion stressed the differences between the sales and use tax with regard to the underlying taxable event and who is responsible for the payment of the tax. *Jefferson Lines*, 131 L. Ed. 2d 280. The discussion in *Jefferson Lines* and *McLeod* fully recognized the differences in theory and application of the sales tax as contrasted with the use tax.

In the present case there is only a value-added tax involved. The fact that there are several methods of calculation to arrive at the very same value-added tax base does not alter the theoretical, factual or economic effect of the tax. By beginning its analysis with a discussion of the SBT as a value-added tax and then acknowledging the equivalent calculation methods used to calculate its base, the courts below rejected Petitioners' form over substance

contentions and fairly analyzed the substance of the SBT."

D. There are no compelling reasons to grant Certiorari.

1. There is no conflict with decisions of this Court.

Petitioners contend that the Sixth Circuit Court of Appeals decision conflicts with relevant decisions of this Court. This is simply not true. The District Court, in *Thiokol Corp., supra,* 858 F. Supp. at 674 (Petitioners' App. 40), predicated its analysis on the specific and unique nature of the SBT as discussed in this Court's decision in *Trinova.* The Court of Appeals cited, and agreed with, the District Court's analysis, in *Thiokol Corp., supra,* as to the nature of value-added taxation. 76 F.3d at 755-756. (Petition App. 10-13). In determining whether the Michigan SBT provision should be pre-empted, both the District Court, in *Thiokol Corp.,* and the Court of Appeals relied upon and applied the pre-emption standard set forth by this Court in *Shaw.* The Court of Appeals found that the applicable pre-emption test is the "relates to" test as expressed in *Shaw* which pre-empts state laws that have a "connection with or reference to" an ERISA-covered plan subject to the proviso that some state laws may affect a plan in a manner that is too tenuous, remote, or

" The Sixth Circuit stated as much at p. 756 of its opinion:

> Michigan would achieve the same results by simply defining compensation as all expenditures on behalf of employees, officers and directors or by replacing its addition method with a subtraction method of calculating a value added tax base. Paying proper heed to the Supreme Court's admonition that in tax matters courts should consider "substance not . . . form," see *Diedrich v Commissioner of Internal Revenue,* 457 U.S. 191, 195, 102 S. Ct. 2414, 2417-2418, 72 L. Ed. 2d 777 (1982), it would appear that Michigan's SBT fits within the *Shaw* exception and is not pre-empted by §514(a)." *Thiokol Corp.,* 76 F.3d 751 (6th Cir. 1996) (Petitioners' App. 13).

peripheral to mandate a finding of preemption. Specifically, the Court of Appeals rejected a bright line test for pre-emption predicated on the use of the "ERISA" word or a mere reference to ERISA-qualified plans because such a test failed to address the effect of a state law on a covered plan. 76 F.3d at 756-757. (Petitioners' App. 17-20). Not only is this conclusion fully in keeping with *Shaw*, it is fully in accord with this Court's most recent expressions set forth in *Travelers* in which this Court rejected "an uncritical literalism" in favor of an analysis which looks to the objectives of the ERISA preemption statute and its intent to avoid a multiplicity of regulations impacting plan benefit levels, plan structure or plan administration. *Travelers*, 131 L. Ed. 2d at 705-707.

The record in this case could not be clearer. The SBT does not regulate directly or indirectly any employee benefit plan. The SBT does not seek payment from a plan or trust, mandate benefits, or require action or involvement on the part of any plan, plan trust administrator or beneficiary. The tax is determined and paid by the business-taxpayer with reference to its books and records only. A ruling in favor of the Petitioners and any ensuing refunds paid to Petitioners will not increase the assets of any plan or plan trust. Any impact or effect of the SBT on a qualified plan is at most tenuous, remote or peripheral within the terms of the *Shaw* exception to pre-emption.

2. Petitioners grossly overstate the policy concerns inherent in this case.

Petitioners claim that allowing this case to stand "will be a clarion call to every state and local taxing jurisdiction... to descend upon employers with tax levies designed to capitalize upon an employer's plan contributions." This claim is utter nonsense. States and local tax authorities do not need to await the outcome of this case to impose a value-added tax upon employers. A subtractive type value-added tax patterned after Michigan's SBT would share its theoretical underpinnings and impact employers, plan sponsors and ERISA-qualified plans in the same tangential, remote and peripheral manner as the SBT. Since such a similarly patterned tax would not be pre-empted because it

would neither "refer" to ERISA plans nor affect such plans in more than a peripheral manner, logically the SBT should not be pre-empted.

From the start Respondents' position has been founded specifically on the nature of the SBT as a value-added tax which is capable of being calculated by use of either an additive or subtractive method to arrive at an equivalent measure. Respondents' position as accepted by the courts below is specific to value-added taxes and is not susceptible to the broad application that Petitioners suggest.

While this case is of extreme importance to the fiscal well being of the State of Michigan[12], it is not a case of national significance. Unlike the surcharge statutes in *Travelers* which exist in similar form in numerous states throughout the country, and divided the federal circuit courts[13] prior to this Court's decision in *Travelers*, no other state, besides Michigan, presently is utilizing a value-added tax.

---

[12] The record includes the Affidavit of David Kirvan, Administrator for the Single Business Tax Division, Department of Treasury, State of Michigan which indicates that as of September 1995, there were 182 ERISA preemption cases seeking refunds in Michigan Courts for a total of $136,844,353.00. In addition, similar claims awaiting administrative decision totaled approximately $100,000,000.00. The annual reduction in single business tax receipts would amount to approximately $140,000,000.00.

[13] See, *United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179 (3rd Cir. 1993), and *Travelers Insurance v. Cuomo*, 14 F.3d 708 (2nd Cir. 1993).

RELIEF SOUGHT

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Daniel M. Greenberg
Michael R. Bell
Assistant Attorneys General
Attorneys for Respondents

June 28, 1996
cases/thiokol

APPENDIX

TABLE OF CONTENTS

Page

January 28, 1994 Opinion Re Appeal of Magistrate Judge's Order Granting Leave to File Third Amended Complaint 1b

Sixth Circuit Court of Appeals Opinion dated March 5, 1993, No. 92-1611..... 9b

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THIOKOL CORP., MORTON INTERNATIONAL, INC., (as successors through corporate reorganization to Morton Thiokol, Inc.) and BEE CHEMICAL COMPANY,

Plaintiffs,

v.

Case No. 4:90-CV-12

HON. DOUGLAS W. HILLMAN

DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan, and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,

Defendants.
_____/

OPINION RE APPEAL OF MAGISTRATE JUDGE'S ORDER GRANTING LEAVE TO FILE THIRD AMENDED COMPLAINT

Plaintiffs Thiokol Corporation, Morton International, Inc., and Bee Chemical Company, all Michigan corporations, brought this action under the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) ("ERISA") to challenge provisions of the Michigan tax code that require them to pay tax on their contributions to employee benefit plans. They originally sought declaratory, injunctive and monetary relief, the last in the form of refunds for their alleged overpayments under the tax law. At the same time, plaintiffs filed complaints in the Michigan Court of Claims.

Presently before the court is plaintiffs' appeal from a single portion of Magistrate Judge Scoville's September 27, 1993 order. Although permitting plaintiffs to file a third amended complaint, that order prohibited them from seeking

declaratory relief with respect to MCL 205.7a(6); MSA 7.657(27a)(6), a 90-day statute of limitations applicable to the refund claims. Specifically, plaintiffs seek a declaration that the state statute is preempted by ERISA, violative of the Fifth and Fourteenth Amendments of the Constitution of the United States, and inconsistent with Congress's regulation of interstate commerce pursuant to Article 1, Section 8 of the Constitution of the United States. Unless declaratory relief is granted on one of these grounds, plaintiffs will have no opportunity to seek refunds for their alleged tax overpayments.

Case History

In their original complaint, plaintiffs sought: (1) a declaration that Michigan's taxation of contributions to employee benefit plans are invalid and preempted by ERISA; (2) injunctions on the future collection of these taxes and on the defendants' refusal to grant their refund requests; and (3) refunds of their alleged tax overpayment, with interest. Plaintiffs' contemporaneous initiation of an action for refunds in the Michigan courts was intended to preserve their chance to seek refunds in the event this court was unable to grant that relief.

On April 15, 1992, this court found that the Eleventh Amendment of the United States Constitution and the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), barred not only plaintiffs' claims for refunds, but their demands for injunctive and declaratory relief as well. Thiokol Corp. v. Dep't. of Treasury, No. 4:90-cv-12 (W.D. Mich. April 15, 1992). Plaintiffs appealed that ruling, and the Court of Appeals for the Sixth Circuit granted the appeal in part and denied it in part. The court held that the defendants' Eleventh Amendment immunity precludes plaintiffs from seeking monetary relief. It further held, however, that neither the Eleventh Amendment nor the TIA prevents plaintiffs from suing defendant Roberts, the Treasurer of the State of Michigan, or defendant Hoatlin, the Commissioner of Revenue for the State of Michigan, in their individual capacities, for prospective injunctive or declaratory relief. Thiokol Corp. v. Dep't. of Treasury, 987 F.2d 376, 382 (6th Cir. 1993). Thus the Sixth Circuit eliminated plaintiffs'

refund claims. Plaintiffs' only remaining opportunity to obtain refunds is in the Michigan Court of Claims. The Sixth Circuit did not specifically address whether or not the relief plaintiffs seek with respect to the statute of limitations, which is now relevant only to their state court claims for refunds, is within the scope of the prospective declaratory relief that they are permitted to pursue in federal court.

After the Sixth Circuit's decision, plaintiffs sought leave to file this amended complaint on August 31, 1993. Judge Scoville granted plaintiffs leave to file the amended complaint, with the exception of several claims including claims for monetary relief and claims for retrospective declaratory or injunctive relief, which he held to be "outside the scope of the mandate of the Court of Appeals." As a consequence of this ruling, Judge Scoville further held, plaintiffs would not be allowed to seek declaratory relief concerning the statute of limitations pertaining to the refund claims. This appeal followed.

Standard of Review

The first issue raised by this appeal is the appropriate standard of review. Plaintiffs have requested that I treat Judge Scoville's order as an order that effectively dismisses plaintiffs' claim for declaratory relief with respect to MCL 205.7a(6); MSA 7.657(27a)(6), or that grants defendants summary judgment on that claim. Therefore, plaintiffs assert, this portion of the order is subject to de novo review.

28 U.S.C. § 636(b)(1)(A) provides that a magistrate judge may be designated to decide "any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment . . ." (listing additional dispositive pretrial motions). The magistrate judge's opinion on a nondispositive matter may be reconsidered by a district judge if it is shown that it is clearly erroneous or contrary to law. Id.; Fed. R.Civ. P. 72(a); United States Fidelity and Guaranty Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088 (6th Cir. 1992).

Normally, a motion to file an amended complaint is just such a nondispositive motion. See, Parrish v. Ford

Motor Co., 909 F.2d 1484 (Table), 1990 WL 109188, **3-**4 (6th Cir. Aug. 2, 1990). Considering plaintiffs' motion accordingly, I find that Judge Scoville's order is neither clearly erroneous nor contrary to law, and therefore deny plaintiffs' appeal.

Were I to treat the order as having decided a dispositive motion, I would be required to conduct a de novo review of the portion of it to which plaintiffs object. 28 U.S.C. 636(b)(1)(C); United States Fidelity and Guaranty Co., 955 F.2d at 1088. My conclusion under this standard would be the same.

Analysis

The Sixth Circuit reviewed this court's earlier dismissal of plaintiffs' motion to file a second amended complaint in this case, Thiokol, 987 F.2d at 383, and its analysis is applicable here.

Federal Rule of Civil Procedure 15(a) provides that once a response to a plaintiff's complaint has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has interpreted the Rule as meaning that:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith . . . futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). This Circuit has held that an amendment to a complaint would be "futile" in this context where the proposed amendment "could not withstand a motion to dismiss." Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21, 23 (6th Cir. 1980).

Plaintiffs maintain that their proposed amendment is within the scope of the Sixth Circuit's opinion and that it would survive a motion to dismiss. The Sixth Circuit, plaintiffs assert, explicitly permitted them to seek "prospective declaratory and injunctive relief" in federal court. The amendment they propose to make is a demand for an order declaring that a state statute of limitations is preempted by ERISA or unconstitutional or both. This order was part of the relief sought in their original complaint, and therefore, plaintiffs claim, the Sixth Circuit's permission for plaintiffs to pursue their claims for "prospective declaratory and injunctive relief" in federal court must be interpreted to include this relief.

Defendants' position, on the other hand, is that plaintiffs' claim for declaratory relief with respect to the statute of limitations is inextricably connected with their claim for refunds. In addition, it pertains to past tax years. Therefore, defendants maintain, for this court to grant declaratory relief with regard to the statute of limitations would be for it to violate the Eleventh Amendment bar on plaintiffs' claims for refunds and retrospective declaratory relief. Instead, defendants assert, if plaintiffs are successful in their remaining federal court claims, winning the other injunctive and declaratory relief they seek, they may subsequently bring this claim for declaratory relief in the state court with their claim for refunds. For this reason, defendants ask that plaintiffs' appeal be denied.

In the Sixth Circuit's earlier opinion in this case, it affirmed this court's dismissal of plaintiffs' proposed addition of a section 1983 claim to their complaint. Thiokol, 987 F.2d at 383. Plaintiffs then wished to seek damages under the section 1983 claim for their claim that state officials' unlawful collection and retention of tax payments had violated the Commerce Clause. Id. But the Sixth Circuit had held earlier in its opinion that the Eleventh Amendment precluded plaintiffs from seeking monetary relief against the state defendants in federal court. Id. at 382. Section 1983, the court reasoned, was not intended by Congress to be used as a means of avoiding the Eleventh Amendment prohibition on suits against state officials in federal court. Id. at 383, citing, Quern v. Jordan, 440 U.S. 332, 59 L. Ed. 2d 358, 99 S.

Ct. 1139 (1979). Therefore, the court held, the district court was correct to deny plaintiffs leave to add a section 1983 claim to their complaint. Id.

Plaintiffs' present attempt to seek declaratory relief presents a similar problem. The Supreme Court of the United States has held that where a federal court is barred by the Eleventh Amendment from granting monetary relief, and the plaintiffs then seek declaratory relief whose only purpose would be as res judicata in a state court action for the same monetary relief, the federal court may not grant the declaratory relief. Green v. Mansour, 474 U.S. 64, 73, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985).

In Green, two plaintiff classes had challenged Michigan's methods for determining eligibility for benefits under the Aid to Families with Dependent Children ("AFDC") program. Id. at 65. While the cases were pending on the merits, Congress changed the relevant AFDC provisions, and Michigan brought its policy into compliance with the amendments, with the result that the violations of which plaintiffs had complained ceased. Id. at 66. The plaintiffs then pursued claims for declaratory and other relief with respect to defendants' past violations. Id. The Eleventh Amendment precluded them from seeking monetary relief or other retrospective relief against the defendants in federal court. Prospective relief to prevent a continuing violation of federal law would be available, however, under Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). Id. at 68. In Green, however, no continuing violation existed, because the challenged AFDC provisions had been changed. Therefore, the only possible use for the declaratory relief sought by the plaintiffs would be if it were subsequently offered as res judicata on the issue of the state's liability in a state court proceeding by the plaintiffs. The state court could then be left to compute damages. Id. at 73. But the federal court's grant of declaratory relief would then "have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." Id. To provide the declaratory relief would thus create an "end run," in the words of the Court, around the Eleventh Amendment block. Id., citing, Edelman v.

Jordan, 415 U.S. at 651, 666-669 (1974).

This case is comparable. Here, the plaintiffs have sought declaratory relief with respect to a statute of limitations. The only possible use for a determination by this court that the statute of limitations is either precluded by ERISA or unconstitutional, however, would be in a state court action for refunds. As noted earlier, no action for refunds is possible in federal court due to the Eleventh Amendment. A grant of declaratory relief in this case by this court would not guarantee a finding of liability against the defendants in plaintiffs' state court refund claims, as would a grant of the relief at issue in Green. Nevertheless, the principle from that case that a federal court prohibited by the Eleventh Amendment from granting certain relief against state officials should not facilitate plaintiffs' recovery of that same relief in state court, should apply here as well. Thus, under Green, the declaratory relief may not be awarded by this court. Plaintiffs are free, of course, to seek declaratory relief with respect to the statute of limitations in the Michigan courts.

The retrospective nature of plaintiffs' requested order pertaining to the statute of limitations is another reason for which I cannot grant this appeal. The Sixth Circuit authorized plaintiffs' claims for "prospective declaratory and injunctive relief" against the individual defendants in their official capacity. Thiokol, 987 F.2d at 382. Plaintiffs' seek a declaratory order with respect to a statute of limitations applicable only to claims for refunds, which are clearly retrospective relief. This relief is distinguishable from the "prospective injunctive relief to prevent a continuing violation of federal law" that is obtainable in federal court in spite of the Eleventh Amendment. Green, 474 U.S. at 68, citing, Ex Parte Young, 209 U.S. 123, 155-56, 52 L. Ed. 714, 28 S. Ct. 441 (1908). For this additional reason, this court could not grant plaintiffs' request for declaratory relief, and the amendment to their complaint would not survive a motion to dismiss.

Because I conclude that plaintiffs' claim for declaratory relief would not survive a motion to dismiss, Judge Scoville's denial of leave to include it in their amended complaint was

neither clearly erroneous nor contrary to law. For this reason, I affirm Judge Scoville's order, and deny plaintiffs' appeal.

Were I to review Judge Scoville's order de novo, as proposed by plaintiffs, my analysis would be the same. For the reasons above, plaintiffs' appeal is denied.

Douglas W. Hillman
Senior District Judge

Dated: JAN 28 1994.

ORDER AFFIRMING DECISION OF MAGISTRATE JUDGE

In accordance with the opinion filed this date,

IT IS ORDERED that the decision of Magistrate Judge Scoville, dated September 28, 1993, granting plaintiffs' leave to file a third amended complaint is hereby **AFFIRMED**, and plaintiffs' appeal is **DENIED**.

Douglas W. Hillman
Senior District Judge

Dated: JAN 28 1994.

THIOKOL CORPORATION; Morton International, Inc., as successors through corporate reorganization to Morton Thiokol, Inc.; and Bee Chemical Company,

Plaintiffs-Appellants,

v.

DEPARTMENT OF TREASURY, STATE OF MICHIGAN, REVENUE DIVISION; Douglas B. Roberts, in his official capacity as Treasurer of the State Of Michigan; and Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan,

Defendants-Appellees,

Robert Bowman, formerly Treasurer of the State of Michigan in his official capacity; and Melvin Van Vorst, former Acting Commissioner of Revenue of the State of Michigan, in his official capacity,

Defendants.

No. 92-1611

United States Court Of Appeals,
Sixth Circuit

[987 F.2d 376]
Decided March 5, 1993
Rehearing Denied May 3, 1993

Before: KENNEDY and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Plaintiffs appeal an order dismissing their complaint in this ERISA action challenging various provisions of the Michigan Tax Code. On January 16, 1990, Thiokol Corporation, Morton International, Inc. and Bee Chemical Company ("plaintiffs"), all Michigan corporations, sued the Revenue Division of the Michigan Department of Treasury, Douglas B. Roberts, in his official capacity as Treasurer of

the State of Michigan and Thomas M. Hoatlin, in his official capacity as Commissioner of Revenue of the State of Michigan ("defendants") in federal district court.[1] Under Michigan's Single Business Tax ("SBT"), contributions to employee benefit plans are taxed. Mich. Comp. Laws §§ 208.4(3), 208.9(5). In their complaint, the plaintiffs sought declaratory, injunctive and monetary relief. In count I, plaintiffs sought a declaration that these provisions of the SBT were invalid and preempted by section 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). In count II, plaintiffs asked the court to enjoin the collection of taxes based on the payment by employers to employee welfare benefit plans and to prohibit defendants from refusing to honor their refund requests. In count III, plaintiffs requested that taxes that they had allegedly erroneously overpaid, be refunded with interest.

On April 15, 1992, the District Court adopted the magistrate judge's Report and Recommendation, which found that the suit was barred by the Eleventh Amendment and the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, as the opinion of the court. The District Court ordered that the plaintiffs' motions for partial summary judgment and leave to file a second amended complaint be denied, and that the defendants' motion for dismissal be granted. This timely appeal followed. For the reasons stated below, we affirm in part and reverse in part.

I.

Two jurisdictional issues of first impression in this Circuit are presented in this appeal. The first involves the intersection of ERISA and the TIA; whether the TIA bars ERISA challenges to state taxes in federal court. The second asks whether by passage of ERISA, Congress intended to abrogate the states' immunity guaranteed by the Eleventh Amendment and subject them to ERISA suits in federal court.

---

[1] In the original and first amended complaint, Robert Bowman, former Treasurer and Melvin Van Vorst, former Commissioner of Revenue of the State of Michigan were the named defendants.

A.

The Tax Injunction Act

The TIA provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The TIA reflects "the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103, 102 S. Ct. 177, 179, 70 L. Ed. 2d 271, (1981). This exclusion of federal courts from the state taxation area is so far reaching it precludes federal courts from declaring state tax laws unconstitutional. *Id.* (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407 (1943)). Although the TIA mentions only injunctions, its policy of comity bars declaratory judgment and 42 U.S.C. § 1983 damage actions as well. *Id.* at 105.

ERISA contains an exclusive federal jurisdiction provision that is also very broad. Section 502(e)(1) provides that:

> [T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary.

29 U.S.C. § 1132(e)(1). This grant of exclusive federal jurisdiction intersects with the TIA's bar of federal jurisdiction and creates the issue in this case.

The issue of whether the TIA bars challenges to state tax laws under ERISA in federal courts was expressly reserved by the Supreme Court in *Franchise Tax Board of California v. Construction Laborers Vacation Trust For Southern*

California, 463 U.S. 1, 20, n. 21, 103 S. Ct. 2841, 2852 n. 21, 77 L. Ed. 2d 420 (1983).

> We express no opinion, however, whether a party in CLVT's position could sue under ERISA to enjoin or to declare invalid a state tax levy, despite the Tax Injunction Act, 28 U.S.C. § 1341. See *California v. Grace Brethren Church*, 457 U.S. 393, [102 S. Ct. 2498, 73 L. Ed. 2d 93] (1982). To do so, it would have to show either that state law provided no "speedy and efficient remedy" or that Congress intended [section] 502 of ERISA to be an exception to the Tax Injunction Act.
>
> To decide this issue, which is squarely before us, we must first determine whether a "plain, speedy and efficient" remedy exists in the Michigan courts, and then, if necessary, determine whether Congress, in passing ERISA, intended to create an exception to the TIA.
>
> Whether a "plain, speedy and efficient" state remedy exists in this case depends on whether the Michigan courts have jurisdiction to decide plaintiffs' ERISA claims despite ERISA's grant of exclusive federal jurisdiction. If they do not, there is, of course, no state remedy. This Circuit has stated that the statutory grant of exclusive jurisdiction in a particular court strips other courts of their original jurisdiction in all cases covered by the statute. *Greater Detroit Resource Recovery Authority v. EPA*, 916 F.2d 317, 322 (6th Cir. 1990). Similarly, the D.C. Circuit has found it "well settled that . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (citations omitted). *See*

also Mississippi v. Louisiana,---- U. S. ----, 113 S. Ct. 549, 121 L. Ed. 2d 466 (1992) (28 U.S.C. § 1251(a), which gives "original and exclusive jurisdiction" over all controversies between the states to the Supreme Court, necessarily denies jurisdiction of such cases to any other federal court). Accordingly, we find that ERISA's express grant of exclusive jurisdiction to the federal courts divests state courts of jurisdiction to hear claims *brought under ERISA. Accord E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1102 (5th Cir.), *cert. denied*, --- U.S. ----, 112 S. Ct. 585, 116 L. Ed. 2d 610 (1991). *Cf. Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992) (where ERISA claims are within the exclusive jurisdiction of the federal courts, state courts are plainly without jurisdiction); *Pension Trust Fund for Operating Engineers v. Triple A Machine Shop*, 942 F.2d 1457, 1461 (9th Cir. 1991) (because of the exclusive jurisdiction of federal courts over ERISA § 502(a)(3) claims, state court had no jurisdiction to hear these claims). *But see Barnes v. E-Systems, Inc.*, ---- U.S. ----, 112 S. Ct. 1, 3, 115 L. Ed. 2d 1087 (1991) (Scalia, Circuit Justice)[2] ("That is not an inevitable implication, and perhaps not a likely one.").

The lower court recognized that federal courts have exclusive jurisdiction of all cases "brought under" ERISA. It concluded, however, that the instant case merely involved an ERISA issue. It concluded that "the state courts lack jurisdiction to determine ERISA preemption only when the plaintiffs' cause of action falls within the scope of

[2] Justice Scalia stayed the Fifth Circuit's judgment in *E-Systems, Inc. v. Pogue* that states were without jurisdiction, finding that *certiorari* and ultimate reversal were likely. However, the Supreme Court denied certiorari. ---- U.S. ----, 112 S. Ct. 585, 116 L. Ed. 2d 610 (1991).

section 502(a) of ERISA, that is, if the action is one by a participant, beneficiary, or fiduciary for relief under ERISA, to enjoin an act or practice violating ERISA, or to obtain other relief enumerated in section 502(a)." It further concluded that all of the plaintiffs' claims fall outside of section 502(a), relying upon *Franchise Tax Board, supra.* In *Franchise Tax Board,* the Supreme Court ordered a remand of an action to state court, even though the central issue in the case was ERISA preemption. 463 U.S. at 28, 103 S. Ct. at 2856. However, in *Franchise Tax Board,* the state had sued CLVT in state court seeking 1) to enforce levies against funds covered by ERISA, and 2) a declaration that such levies were valid in anticipation of the defendant's ERISA preemption defense. The defendants removed the case to federal district court under 28 U.S.C. § 1441. The Court held that under the well-pleaded complaint rule, the case was not removable despite the fact that the federal defense was the only question truly at issue, because the plaintiff's claims did not arise under federal law.

"A suit arises under the law that creates the cause of action." *Id.* at 8-9 (quoting *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36 S. Ct. 585, 60 L. Ed. 987, (1916)).

Section 502(a)(3) of ERISA, [29 U.S.C. § 1132(a)(3),] specifically grants trustees of ERISA-covered plans like CLVT a cause of action for injunctive relief when their rights and duties under ERISA are at issue, and that action is exclusively governed by federal law. . . .

The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties . . . as to whom Congress presumably

> determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit against such parties must also be brought in federal court when they themselves did not choose to sue.
>
> . . . .
>
> ERISA carefully enumerates the parties entitled to seek relief under [section] 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 19-21, 27, 103 S. Ct. at 2851-52, 2855 (footnotes omitted) (emphasis in original). The Court twice warned that it was expressing no opinion as to the effect of the Tax Injunction Act. *Id.* at 20 n. 21, 27 n. 31, 103 S. Ct. 2851 n. 21, 2855 n. 31. However, the above passages tell us that a claim brought by a fiduciary under section 502(a)(3) is considered a claim brought under ERISA. Because the Franchise Tax Board was not an "enumerated party" under section 502(a), the Court held that the Board's claim for declaratory relief on the preemption issue did not arise under ERISA. Under these circumstances, the exclusive federal jurisdiction provision, 29 U.S.C. § 1132(e)(1), is inapplicable and state courts are free to decide the ERISA preemption issue.

Plaintiffs seek two kinds of relief, a refund for past taxes paid and injunctive or declaratory relief to prevent future collection. Plaintiffs' claim for a refund is created by state law, M.C.L.A. § 205.1 *et seq.* Even though entitlement to a refund will be dependent upon ERISA preemption, section 502(a) does not expressly create a refund cause of action. It is possible that section 502(a)(3)(B)(i), which creates a cause of action for obtaining "equitable relief" to redress ERISA violations, encompasses the refund of monies wrongfully collected. However, we do not decide the issue

of whether plaintiffs' claim for a state tax refund arises under ERISA because, as discussed below, the Eleventh Amendment bars all claims for monetary relief against defendants.

ERISA does, however, expressly create an injunctive remedy. Section 502(a)(3) provides in pertinent part:

> A civil action may be brought--
>
> . . . .
>
> By a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter, . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter . . . .

29 U.S.C. § 1132(a)(3).[3] Section 502 (a)(3)(B) has been interpreted as creating a cause of action for a declaratory judgment. *Franchise Tax Board*, 463 U.S. at 27 n.31, 103 S. Ct. at 2855 n. 31 (citing *Cutaiar v. Marshall*, 590 F.2d 523, 527 (3d Cir. 1979)). We find that plaintiffs' claims for injunctive and declaratory relief against defendants are brought under ERISA. Therefore, under *Franchise Tax Board*, the exclusive federal jurisdiction provision of ERISA, 29 U.S.C. § 1132(e)(1), applies, and under these circumstances, the Michigan courts lack jurisdiction to decide these ERISA claims.

Because the Michigan courts lack the jurisdiction to decide the plaintiffs' injunctive and declaratory ERISA claims, the plaintiffs are without a "plain, speedy and efficient" remedy at state law. Thus, the District Court has jurisdiction over those challenges to Michigan's tax code under ERISA seeking injunctive and declaratory relief. Because we find that the "plain, speedy and efficient"

[3] Section 1144 preempts all state laws relating to employee benefit plans including state tax laws. 29 U.S.C. § 1144(a) and (b)(5)(B)(i).

exception to the TIA applies here, we find it unnecessary to decide whether Congress intended section 502 of ERISA to be an exception to the TIA.

B.

The Eleventh Amendment

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of a Foreign State.

U.S. Const. amend. XI. This immunity is far reaching. It bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100-01, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984), by citizens of another state, foreigners or its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842, (1890). The amendment also bars suits for monetary relief against state officials sued in their official capacity. However, the amendment does not preclude actions against state officials sued in their official capacity for prospective injunctive or declaratory relief. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, (1908).

The Eleventh Amendment has no application under two circumstances: 1) where a state has itself waived its immunity from federal suit; and 2) where Congress has abrogated the states' immunity. The plaintiffs make no argument for waiver, but do argue that Congress intended to abrogate the states' immunity by passing ERISA.

Congress may override the states' Eleventh Amendment immunity when it acts pursuant to its powers under the Fourteenth Amendment, *Dellmuth v. Muth*, 491 U.S. 223, 227, 109 S. Ct. 2397, 2400, 105 L. Ed. 2d 181 (1989) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.

Ct. 2666, 49 L. Ed. 2d 614 (1976)), or pursuant to the Commerce Clause, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-19, 109 S. Ct. 2273, 2281-84, 105 L. Ed. 2d 1 (1989) (plurality opinion). The Supreme Court has set forth and adhered to a strict test for Congressional elimination of state sovereignty. This test requires unequivocal and textual support:

> Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985). While falling short of requiring Congress to explicitly annul state immunity by making reference to the Eleventh Amendment or state sovereign immunity, *see Dellmuth*, 491 U.S. at 233, 109 S. Ct. at 2402 (Scalia, J., concurring), the Court has consistently found no abrogation in the absence of the requisite clear statutory language the *Atascadero* test requires. See *Dellmuth*, 491 U.S. at 227-32, 109 S. Ct. at 2399-402 (the Education of the Handicapped Act ("EHA") does not abrogate state immunity); *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 475, 107 S. Ct. 2941, 2947, 97 L. Ed. 2d 389 (1987) (Congress did not express in "unmistakable statutory language" its intention to abrogate state immunity under the Jones Act); *Atascadero*, 473 U.S. at 242-46 105 S. Ct. at 3147-49 (statutory language of the Rehabilitation Act not sufficiently clear to abrogate state immunity).

In *Union Gas*, the Supreme Court held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), abrogated the states' Eleventh Amendment immunity to be free from suits in federal court. The Court found in CERCLA's text the clear and unmistakable statutory language it found lacking in the EHA, the Jones Act and the Rehabilitation Act. What distinguishes CERCLA are its provisions expressly subjecting states to suit for

money damages under CERCLA.

Under CERCLA's liability scheme, persons who own or operate hazardous waste facilities or who transport or dispose of hazardous waste are liable for all costs of removal and remediation at the site. 42 U.S.C. § 9607(a). States are expressly included in the statute's definition of "persons" potentially liable under CERCLA. *Id.* § 9601(21). CERCLA also expressly provides that states are to be treated in exactly the same manner as non-governmental owner/operators, in all but one circumstance, including liability. *Id.* § 9601(20)(D). The Court found it "highly significant" that Congress used language almost identical to the language of the provision waiving federal immunity to CERCLA suits in the state liability section. Another section of the statute provides that states will not be liable where "actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." It continues, "[t]his paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government." *Id.* § 9607(d)(2). The Court concluded that the limitations on the states' liability found in sections 9601(20)(D) and 9607(d)(2) presupposed that states were liable as a general rule. *Union Gas*, 491 U.S. at 8, 10, 109 S. Ct. 2277-78, 2279. Based on the above language, the Court held that "the language of CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court." *Id.* at 13, 109 S. Ct. at 2280.

When compared to the statutory language interpreted by the *Union Gas* Court, the text of ERISA falls short of the clarity by which Congress expressed its intent to subject states to federal suits under CERCLA. In *Dellmuth, Welch,* and *Atascadero,* the only statutory support for abrogation was a general authorization for suits in federal court. The Court found that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Dellmuth,* 491 U.S. at 231, 109 S. Ct. at 2402 (quoting *Atascadero,* 473 U.S. at 246, 105 S. Ct. at 3149). In addition to granting federal jurisdiction, ERISA provides for *exclusive* federal jurisdiction

over all civil actions brought under ERISA. 29 U.S.C. § 1132(a). ERISA also preempts all state laws relating to employee benefit plans, *Id.* § 1144(a), including state tax laws. *Id.* § 1144(b)(5)(B)(i). Plaintiffs argue that when viewed together, these provisions require them to bring their preemption suit against the state in federal court. While no provision expressly excludes states as potential defendants, neither does any provision expressly include states or waive their traditionally held immunity from suits in federal court. In the absence of unmistakably clear language, we cannot hold that ERISA abrogates the Eleventh Amendment.

This conclusion does not render section 1144(b)(5)(B)(i), subjecting state tax laws to ERISA's pre-emption provision, meaningless. Application of the Eleventh Amendment has the following effects: 1) all claims against the Department of Treasury are barred; and 2) all claims against all parties for monetary relief are also barred. We hold that neither the Eleventh Amendment nor the TIA bars plaintiffs from suing defendant officials Roberts and Hoatlin in their official capacity for prospective declaratory and injunctive relief.

II.

Motion for Leave to File Second Amended Complaint

Plaintiffs sought to add a claim under 42 U.S.C. § 1983 for violation of the Commerce Clause. Where a response to a complaint has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15 (a). The defendants did not consent to the amendment. The Supreme Court has set forth the general standard to be used under Rule 15 (a):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or

> dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). This Circuit has addressed the issue of "futility" in the context of motions to amend, holding that where a proposed amendment would not survive a motion to dismiss, the court need not permit the amendment. *Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir. 1980).

The District Court found that it would be futile for plaintiffs to amend their complaint to add a claim under section 1983. Congress did not intend to abrogate the states' Eleventh Amendment immunity by passing section 1983. *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979). The Supreme Court has held that a state is not a "person" who can be sued as that term is used in section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989). These holdings apply also to claims against officials acting in their official capacities. *Id.* at 71, 109 S. Ct. at 2312.

The proposed claim for refund of taxes paid would not be able to withstand a motion to dismiss by the Department of Treasury since as part of the state it is immune under the Eleventh Amendment, and it is not a "person" within the meaning of section 1983. Nor would that proposed claim be able to withstand a motion to dismiss by the named officials. This Court has held that section 1983 plaintiffs must clearly set forth in their pleadings that they are suing the officials in their individual capacities for damages, not simply in their capacities as state officials. *Hardin v. Straub*, 954 F.2d 1193, 1199 (6th Cir. 1992); *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989). Failure to clearly name the officials in their individual capacities mandates the conclusion that jurisdiction is lacking over any possible claims against the officials in their

individual capacities. *Id.* at 593-94. Moreover, since plaintiffs seek judgment for taxes unlawfully collected and retained by the treasury of the state, the proposed claim can only be against the officials in their official capacities. Further, since the amended claim was to be based on the Commerce Clause where there is no exclusive jurisdiction in the federal courts, plaintiffs would have a speedy and efficient remedy in state courts and the suit would be barred by the TIA. The District Court did not err in dismissing the motion to amend.

III.

For the reasons discussed above, the District Court's decision is AFFIRMED in part and REVERSED in part. We AFFIRM the dismissal of all claims for monetary damages against all of the defendants as well as all claims against the Department of Treasury. We also AFFIRM the court's denial of the plaintiffs' motion for leave to file a second amended complaint. We REVERSE the dismissal of the claims for injunctive and declaratory relief under ERISA against the defendant officials and REMAND the case to the District Court.